No. 52670-1-2

WASHINGTON STATE COURT OF APPEALS DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

XAVIER MICHAEL MAGANA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY
The Honorable Frank E. Cuthbertson, Judge

BRIEF OF APPELLANT

Xavier Michael Magana, DOC#348190
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA. 98520

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II.) Denial of Appellant's: Motion To Subpoena Witnesses, Motion To Produce, Motion To Compel, and Motion For Evidentiary Hearing, denied Appellant procedural due process under U.S.C. Amend. V.

III.) Denial of Appellant's motions without His presence denied Appellant procedural due process under U.S.C. Amend. V, VI.

IV.) Denial of Appellant's motions without representation of counsel denied Appellant guarantees under U.S.C. Amend. VI.

V.) Denial of Appellant's motions in a closed courtroom denied Appellant guarantees under U.S.C. Amend. VI.

VI.) Denial of Appellant's motions without providing any reasoning denied Appellant procedural due process under U.S.C. Amend. V.

VII.) Imposition of sentence beyond the standard range sentence violated Appellant's rights under U.S.C. Amend. VI.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

I.) Appellant requested public disclosure of records from The Pierce County Prosecuting Attorney between July 2015 and December 2015, regarding witness statements which were written in the spanish language; and again between November 2016 and April 2017, regarding His cellphone GPS coordinates. All material were denied/withheld.

Appellant then moved the trial court for the production of these materials and all other mitigating evidence and exculpatory evidence in The Pierce County Prosecuting Attorney's possession. With evidence before the court of the prosecution's withholding/denial of such material, did the court's failure to grant the motion(s) or hold a formal evidentiary hearing deny Appellant His guarantees under U.S.C. Amend. V, VI, and XIV?

II.) Appellant's Motion To Produce Mitigating Evidence And Eculpatory Evidence was returned "back to the superior court for further action. CrR 7.8(c)." With CrR 7.8(c) providing for an

evidentiary hearing and R.A.P. 16.12 governing, did the denial of Appellant's motion to: Subpoena Witnesses, Produce, Compel, and For An Evidentiary Hearing deny Appellant procedural due process under U.S.C. Amend. V?

III.) Did the court's denial of Appellant's motions, without His presence at the hearing(s), deny Appellant procedural due process?

IV.) Did the court's denial of Appellant's motions, without representation of counsel deny Appellant due process under U.S.C. Amend. VI and W.S.C. Art. 1, §22?

V.) Did the court's denial of Appellant's motions outside the presence of the public deny Appellant His guarantees under U.S.C. Amend. VI and W.S.C. Art. 1, §10?

VI.) Did the court's denial of Appellant's motions without providing any reasoning deny Appellant procedural due process under U.S.C. Amend. V?

VII.) Did the court's denial of Appellant's Motion To Correct Judgement And Sentence, regarding the imposition of a sentence beyond the stan-

dard range sentence violate Appellant's guarantees under U.S.C. Amend. VI?

B. STATEMENT OF THE CASE

On July 13, 2009, The Pierce County Prosecuting Attorney charged Appellant Xavier Magana with First Degree Murder and Second Degree Unlawful Possession Of A Firearm. CP 1-2; RCW 9A.32.030 (1)(a); RCW 9.41.040(2)(a)(i). In April 2010, the Information was amended, adding allegations of aggravating factors as to each offense. In February 2011, The State amended the Information again, dismissing the aggravating factor allegations and the firearm charge in exchange for Appellant's agreement to plead guilty, having been sentenced MArch 25, 2011. CP 5-15; CP 20-30.

On October 3, 2017 Appellant filed a "Motion For The Production Of Exculpatory Evidence And Mitigating Evidence", in The Pierce County Superior Court. CP 56-71. On November 22, 2017 The Pierce County Superior Court attempted to transfer the matter to The Court Of Appeals Division Two for consideration as a Personal Restraint Petition. CP 91-92. On March 5, 2018, The Court Of Appeals Divison Two rejected the transfer, returning the matter "back to the superior court for further action. CrR 7.8(c)." CP 148.

Appellant filed subsequent motion in The Pierce County Superior Court, which sat idly until October 2018. CP 139. On October 1st, 2nd, and 3rd, 2018, The Pierce County Superior Court entered orders denying the forthcoming motions, to which this appeal derives: "Motion To Correct Judgement And Sentence", CP___-___; "Motion For The Production Of Exculpatory Evidence And Mitigating Evidence", CP 56-71; "Motion To Produce Discovery Material", CP 93-96; "Motion For Recusal", CP 98-101; "Motion To Subpoena Witnesses", CP 104-105; "Motion To Supplement And Consolidate", CP 102-103; "Motion To Produce", CP 106-113 "Motion To Compel", CP 114-138; "Motion For Neutral Action", CP 150-165; "Motion To Transport", CP 178-180; and "Motion For Evidentiary Hearing" CP 182-184. Appellant filed this timely appeal. CP 195-225.

C.ARGUMENT(S)

I.) The trial court's denial of Appellant's Motion For The Production Of Exculpatory Evidence And Mitigating Evidence, CP 204; and Motion To Produce Discovery Material, CP 205; are clear violations of Appellant's rights under the 5th, 6th, and 14th amendments of The U.S.C. and the suppression of evidence. See: Kyles v. Whitley,

514 U.S. 419(1995); Brady v. Maryland, 373 U.S. 83(1963); Ashley v. Texas, 319 F.2d 80(5th cir. 1963).

Inorder to prevail on a Brady claim, the [Appellant] must establish the evidence at issue was: 1.)Exculpatory, 2.)Suppressed by The State, and 3.)Material. See: Brady v. Maryland, supra.

The disclosure obligation under rule 3.8(d) is broader than that under Brady: 1.)It applies to both "evidence" and "information", and 2.)It is not limited to that which is "maerial". In addition, disclosure is mandated under rule 3.8(d) when the evidence or information either independently meets the articulated standard or meets it when viewed in light of other evidence or information known to the prosecutor(Article 8, id. at 5, ABA Model Rules Of Prof'l Conduct R. 3.8).

Between July 2015 and December 2015 Appellant attempted to public disclose the witness statements written in spanish from The Pierce County Prosecuting Attorney, CP 126-136; and the GPS coordinates between November 2016 and April 2017 CP___-___. All requests were denied. CP___-___; CP 128-129; CP 132-133; CP 136. Appellant recieved His entire attorney/client file from former defense attorney John McNeish in 2013, to which these documents were nonexistent. CP 119-121.

Appellant went further and public disclosed "Sprint Corporate Office/Sprint Nextel Corporation" on September 4, 2017, whom denied the request, directing Appellant to contact the courts for these documents. CP___-___. As such, the prosecution is in possession of the documents requested, having knowningly withheld/suppressed said documents, and are the only source to obtain these documents.

The GPS coordinates alone are arguably exculpatory as the information contained within contradict the prosecutions lead witness, CP 60-61; undermining the "Declaration For Determination Of Probable Cause", CP 3-4. Appellant was accused of committing First Degree Murder, in which a prerequisite is premeditation. The prosecution's theory of the case, based upon its lead witness, was that Appellant was not present at 618 East 56th Street for several hours prior to the shooting, and premeditated the murder. CP 3-4. See Also: "Motion To Admit". Lacking premeditation, at most the proper charge would have been Murder In The Second Degree. See: Hayes v. Brown, 399 F.3d 972(9th cir. 2005)(en banc)("Prosecutor's knowing presentation of false evidence and failure to correct the record....violate[d] due process"); Benn v. Lampbert, 283 F.3d 1040(9th

cir.), cert denied, 537 U.S. 942(2002)(Prosecution violated Brady v. Maryland by failing to disclose evidence undermining critical testimony by jailhouse informant and by suppressing-and misleading defense about-expert's findings that refuted prosecutions theory of motive for crime and basis for aggravating circumstance).

As to the witness statements written in the spanish language, the prosecution had and maintains a continued obligation to disclose said material. Further, a translation is necessary to determine its contents and whether or not they contain exculpatory statements and/or could have changed the outcome of Appellant's case, providing the ability to present a defense, had He went to trial.

The trial court failed to conduct any analysis when determining to deny appellant's motion(s), which request all material in addition to the cellphone GPS coordinates and spanish witness statements. CP 196; CP 204-213. "A state court may not 'bolt the door to equal justice' to indigent defendants." Halbert v. Michigan, 545 U.S. 605, 610(2005). See: Barker v. Fleming, 423 F.3d 1085, 1095(9th cir. 2005), cert. denied, 547 U.S. 1138(2006)("[B]ecause the state court did not conduct the proper analysis [of prisoner's

claim under Brady v. Maryland, in that state court analyzed materality of items of suppressed evidence item-by-item rather than collectively], AEDPA's restrictions on our review do not apply"); Gonzales v. Mckune, 247 F.3d 1066, 1077 (10th cir. 2001), vac'd on other grounds, 279 F.3d 922(10th cir. 2002)(en banc).

II.) The trial court failed to follow this Court Of Appeals March 5, 2018 directive, providing for an evidentiary hearing, CP 148; and in doing so violated Appellant's right to procedural due process in denying His motions to: Subpoena Witnesses, Produce, Compel, and for an Evidentiary Hearing.

On October 3, 2017 Appellant filed a "Motion For The Production Of Exculpatory Evidence And Mitigating Evidence", in The Pierce County Superior COurt. CP 56-71. On November 22, 2017 The Pierce County Superior Court attempted to transfer the matter to this Court Of Appeals as a Personal Restraint Petition. CP 91-92. On March 5, 2018 this Court Of Appeals rejected the transfer, returning the matter "back to the superior court for further action. CrR 7.8(c)." CP 148.

The return of Appellant's motion required an evidentiary hearing under CrR 7.8(c), more so

R.A.P. 16.12 governs and enables Appellant to make specific requests regarding this hearing.

R.A.P. 16.12 provides in relevant part:....The parties, on motion, will be granted reasonable pretrial discovery. Each party has the right to subpoena witnesses. The hearing shall be held before a judge who was not involved in the challenged proceeding. The petitioner has the right to be present at the hearing, the right to cross examine adverse witnesses, and the right to counsel to the extent authorized by statue. The rules of evidence apply at the hearing.

These requests were included in Appellant's motions to: Subpoena Witnesses, CP104-105; Produce, CP 106-113; Compel, 114-138; and for an Evidentiary Hearing, CP 182-184. Appellant was denied all of these rights. And the fact that these motions were denied question the biasness of the trial court. CP 150-165.

The subpoenas are necessary, in order to allow Appellant the opportunity to extract potentially exculpatory evidence, to protect His right to present a defense under the 6th amendment. When viewed in light of the prosecutor's obligation under Brady v. Maryland, as well as under The ABA Standards, denial of the requested subpoenas amounted to the willful suppression of evidence.

Further, the cumulative effect of the denial, CP 207; when combined with all previous denials, CP 128-129; CP 132-133; CP 136; CP___-___; result in a blatant showing of governmental misconduct; which certainly requires dismissal with prejudice, for failure to provide material facts-after given notice. This substantially limits the status quo, limiting Appellant's freedmon to examine the physical evidence, or depose of credibility of state witnesses.

The denial of Appellant's Motion To Produce effectively offended the 5th, 6th, 8th, and 14th amendments of The U.S.C., The W.S.C., and the ruling in **Pennsylvania v. Richie**, 480 U.S. 39, 59-61(1987). Appellant was/is entitled to all documents listed within the motion, and the continued denial/suppression is a blatant form of governmental misconduct.

The denial of Appellant's Motion To Compel prejudiced Appellant, in the continued suppression /withholding of evidence which tends to negate guilt. Appellant was/is entitled to any gunshot residue(GSR) tests, of the victim, Alrick Hendricks; or in the event that The State failed in its official capacity to provide such tests, and no such results exist, its impediment that an order be issued to exhume the remains of the vi-

ctim, for purposes of GSR testing.

Appellant formally asserted and authenticated (or attempted to), that on July 12, 2009, during the commission of the events that led to the tragic death of Alrick Hendricks: Alrick Hendricks did possess and brandish a firearm, in which multiple shots were fired upon Appellant. CP 137-138.

This evidence(the GSR test results) is classified as Brady v. Maryland material, admissible under the obligations of ABA Model rule 3.8(d). Further, as this is direct evidence, not circumstantial evidence, that contributes to proving Appellant's defense while disproving The State's "theory of the case". More so, it is a contribution to the Brady material claims, that have been presented to this court-also deemed corrobative evidence, that supports Appellant's declaration made within Appellant's "Motion To Compel". CP 137-138.

III.) Appellant was denied His constitutional right to be present at the October 1st, 2nd, and 3rd, 2018 hearing(s).

The trial court exercised its discretion in making determination(s) when entering ruling(s) denying all reliefs sought. CP 196; CP 204-219.

The subject matter encompassed within the motions implicate constitutional guarantees, which when denied resulted in a complete miscarriage of justice. Deeming the hearing(s) critical stages of the upmost importance. Without Appellant present, the trial court was unopposed from abusing its authority and denying relief with no objection or resistance.

A criminal defendant has a constitutional right to be present derives from the federal and state constitutions and court rule. W.S.C. Art. 1, §22("In criminal proceedings the accused shall have the right to appear and defend in person or by counsel"); U.S.C. Amend. XIV("Nor shall any state deprive any person of life, liberty, or property, without due process of law"); CrR 3.4. The constitutional right to be present extends to any stage of the criminal proceedings where the defendant's "substantial rights might be affected." State v. Walker, 13 Wn. App. 545 (1975). See Also: Snyder v. Commonwealth of Massachusetts, 291 U.S. 97(1934)(Defendant must "be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge").

IV.) Appellant was denied His constitutional right to the assistance of counsel at the October 1st, 2nd, and 3rd, 2018 hearing(s).

The trial court undisputably violated Appellant's constitutional right to be represented by counsel, when denying all motions without a representative on Appellant's behalf. Effectively abusing its discretion. See: State v. Cross, 156 Wn.2d 580(2006); Lamere v. Risley, 827 F.2d at 626(1987).

A criminal defendant also has a constitutional right to the assistance of counsel at every "critical stage" of the proceedings. U.S.C. Amend. VI("In all criminal prosecutions, the accused shall enjoy the right....to have the assistance of counsel at his defence"); W.S.C. Art. 1, §22; State v. Reddrick, 166 Wn.2d 898(2009). A critical stage is "one in which a defendant's rights might be lost, defenses waived, priveleges claimed or waived, or in which the outcome of the case is otherwise substantially affected." State v. Reddrick, 166 Wn.2d at 910(2009)(internal quotation marks and citations omitted). See Also: Faretta v. California, 422 U.S. 806(1975).

V.) Appellant was denied His constitutional right to a public hearing at the October 1st, 2nd,

and 3rd, 2018 hearing(s).

A criminal defendant has a right to a public trial is guaranteed by our state and federal constitutions. U.S.C. Amend. VI; W.S.C. Art. 1, §10(Guarantees that justice in all cases shall be administered openly); W.S.C. Art. 1, §22(Providing "the accused shall have the right....to a speedy public trial").

Our states supreme court has held that the usual presumption of perjudice applicable to courtroom closure claims raised on direct appeal does not apply in the PRP context. In re Coggin, 182 Wn.2d 115(2014). Appellant is on direct appeal, thus prejudice is presumed.

The October 1st, 2nd, and 3rd, 2018 orders were ruled in chambers, outside the presence of the public, courtroom, prosecution, and defense. It is clearly established, within the four corners of the order(s), that none of the aforementioned were present for the issuance of the orders. CP 196; CP 204-219. Further, the orders cross out "in open court", supporting the claim that at the "hearing" was closed. And the nonexistence of verbatim report of proceedings, further solidify this claim. See: "Motion To Take Judicial Notice(ER 201(d))", filed May 30, 2019.

(a.) The Washington Supreme Court has establis-

hed that a trial court may close a courtroom so long as it considers the five criteria outlined in State v. Bone-Club, 128 Wn.2d 254(1995). The five factors are (1)The propenent of closure must make a showing of compelling need, (2)Any person present when the motion is made must be given an opportunity to object, (3)The means of the curtailing open access must be the least restrictive means available for protecting the threatened interests of the public and the closure, and (5)The order must be no broader in application or duration than necessary.

The instant case is similar to State v. Frawley, 181 Wn.2d 452(2014), where it was concluded that conducting proceedings inchambers so that the public is excluded constitutes a closure given that the trial court did not conduct a Bone-Club analysis, so closure was not justified State v. Smith, 181 Wn.2d 508(2013). See Also: Presley v. Georgia, 558 U.S. 209(2010).

(b.) Whether a defendant's public trial right has been violated is a question of law that is ruled De Novo. State v. Wise, 176 Wn.2d 1(2001) (quoting State v. Easterling, 157 Wn.2d 167 (2006)). To answer that question, the court engages in a three part inquiry: "(1)Does the proceeding at issue implicate the public trial

right? (2)If so, was the proceeding closed? And (3)If so, was the closure justified?" State v. Smith, 181 Wn.2d 508(2013)(citing State v. Sublett, 176 Wn.2d 58(2012)(Madsen, C.J. concurring).

The inchamber ruling was definately a closure, and the Bone-Club analysis was not conducted; satisifying 2 and 3. To determine whether a public trial right attaches to a particular proceeding, we apply the "experience and logic test". State v. Smith, 181 Wn.2d 508(2013). If both prongs are satisified, the public trial right attaches. In re Det. of Morgan, 180 Wn.2d 312(2013) The guiding principle is "whether openness will "enhance [] both the basic fairness so essential to public confidence in the system."" State v. Smith, 181 Wn.2d 508(2013). It would be absurd to state with conviction, that the 1st part, of the 3 prong inquiry, has not been met. The next question were left to, is whether the presiding judge, Frank E. Cuthbertson, is bias, as asserted by Appellant. CP 150-165.

VI.) Because the trial court did not provide any reasons for the denial of Appellant's motions, CP 196; CP 204-219; the procedural unfairness violates the due process clause.

All motions that were denied and thus predicate to this appeal are clear indications of the trial court abusing its discretion. "An order that does not provide any reasons for the courts decision is subject to reversal for abuse of discretion." Beers v. Ross, 137 Wash. App. 566 (2007). And the 'denials' cannot be said to have resolved substantial enough matters to merit plenary consideration following briefing and argument by interested parties.

The due process clause of the 14th amendment, mandates an "adequate corrective process". See: United States ex rel. Herman v. Claudy, 350 U.S. 116, 119(1956)(suggesting cognizability of claimed "denial of....constitutional protections.... in a state postconviction proceeding). "The state postconviction remedy....should provide for decisions and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts." Case v. Nebraska, 381 U.S. at 347(1965). See Also: Delgado v. Lewis, 181 F.3d 1087(9th cir. 1999), judgement vacated on other grounds, 528 U.S. 1133(2000)("When a state court does not furnish a basis for its reasoning, we have no basis other than the record for knowing whether the state court correctly identified the governing legal principle or was extending the

principle into a new context. The state can not be insulated from habeas review in federal courts simply by failing to provide any reasoned explanation for the disposition. We reject this argument now, just as we did in Delgado I.").

VII.) The trial court's denial of Appellant's Motion To Correct Judgement And Sentence, CP196; CP___-___; regarding the imposition of a sentence beyond the standard range sentence violated Appellant's guarantees under The U.S.C. Amend. VI; when He recieved an illegal sentence, without: 1.)Recieving notice of The State's intent, and 2.)The trial court did not enter "Findings Of Fact And Conclusions Of Law", justifying the imposition of an exceptional sentence.

Its clearly established within the four corners of the Judgement and Sentence, CP 20-30; that Appellant recieved a sentence totaling 369 months(333 months of confinement, 36 months of community custody); although the standard range sentence is 250-333 months, thus the 'relevant statutory maximum' is 333 months.

Appellant's illegal sentence was imposed in violation of His sixth amendment right to a jury trial. This is a question of law that the appellate court reviews De Novo. State v. Saltz, 137

Wn. App. 576(2007).

Further, the trial court unconstitutionally applied chapter 9.94A RCW to the facts of this case. The interpretation of The Sentencing Reform Act of 1981 is a question of law that is ruled De Novo. State v. Caldwell, 2015 Wash. App. LEXIS 347(2015).

The State did not satisify RCW 9.94A.537(1) because The State did not give Appellant pretrial notice of its intention to seek an exceptional sentence. CP 1-2. State v. Vance, No. 5536 4-0-I(2008)(citing State v. Womac, 160 Wn.2d 643 (2007)). Accoringly, the trial court unconstitutionally applied RCW 9.94A.537(1) to this case, by imposing an exceptional sentence in which "the notice shall state aggravating circumstances upon which the requested sentence was based."

The trial court also unconstitutionally applied RCW 9.94A.525, as it is well established that Appellant's relevant statutory maximum is 333 months. It is no matter that the maximum penalty is LIFE. See: Apprendi v. New Jersey, 530 U.S. 466(2000). In United States v. Booker, 543 U.S. 220(2005), the court held that the sixth amendment as construed in Blakely v. Washington, 542 U.S. 296(2004) does apply to the sentencing guidelines. Further, The Washington Supreme Court

clarified in State v. Evans, 154 Wn.2d 438(2005) that the statutory maximum is the top end of the standard range sentence. The maximum term for an offense that the legislature authorized for a specific crime. This determination has also been upheld in: State v. Hughes. 74147-6(2004); State v. Alvarado, 81069-9(2008).

Further, the trial court unconstitutionally aplied RCW 9.94A.533(g), and RCW 9.94A.701(9) to the facts of this case; failing to reduce the term of confinement and community custody "so that the total confinement does not exceed the statutory maximum." This is a clear and convincing application and misrepresentation of the legislature's intent in the statues. See Also: RCW 9.94A.599(also unconstitutionally applied).

D.CONCLUSION

Based upon the above, Appellant seeks the following relief(s): 1.)Dismissal of criminal charges with prejudice, for governmental misconduct in relations to withholding/suppression of evidence; 2.)Order The State to produce all material requested and/or 3.)Order an evidentiary/reference hearing to dispute material facts relevant to withheld materials; 4.)Strike all orders entered by The Pierce County Superior Court, and

remand for proper hearings, in which Appellant is to be present, at a superior court of unbias venue(change of venue); 5.)Order a resentencing hearing regarding Issue VII; 6.)Or any other relief deemed legally adequate.

SIGNED and DATED this 17th day of June, 2019.

Respectfully Submitted,

Xavier Magana/Appellant

TAKE NOTICE: THE COMPLETE RECORD HAS YET TO BE TRANSMITTED TO THIS COURT OF APPEALS. AS SUCH, APPELLANT HAS OMITTED REFERENCE TO PROPER 'CLERK'S PAPERS'(CP), ON SEVERAL PAGES. APPELLANT RESERVES THE RIGHT TO AMEND/SUPPLEMENT THIS BRIEF, ONCE THE REMAINDER RECORD FOR REVIEW HAS BEEN TRANSMITTED, AND A COPY SERVED UPON APPELLANT

DECLARATION OF SERVICE BY MAIL

I, Xavier Michael Magana, declare and say:

That on the 25th day of June, 2019, I depositted the following documents in The Stafford Creek Corrections Center Legal Mail System, by First Class pre-paid postage, under Court Of Appeals Case Number 52670-1-II:

1.)"Brief Of Appellant".

Addressed to the following:

1.)Court Of Appeals Division Two, ATTN! David Ponzoha, 950 Broadway, Suite# 300, Tacoma, WA. 98402;

2.)Pierce County Prosecuting Attorney, ATTN! Kristie Barham, 930 Tacoma Avenue South, RM# 946, Tacoma, WA. 989402.

I declare under penalty of perjury under the laws of The State Of Washington that the foregoing is true and correct.

SIGNED and DATED this 25th day of June, 2019, in the city of Aberdeen, county of Grays Harbor, State Of Washington.

Xavier Michael Magana, DOC#348190
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Aberdeen, WA. 989520